

Craft v. National Park Service, [34 F.3d 918 \(9th Cir. 1994\)](#), *aff'd* [No. 92-1769 \(C.D. Cal. 1992\)](#), *aff'd* 6 O.R.W. 684 and 687 (NOAA App. 1992).

Location: Channel Islands National Marine Sanctuary

Applicable Law: [National Marine Sanctuaries Act](#) (NMSA) ([16 U.S.C. §§ 1431, et seq.](#))

Where Law Applies: *National Marine Sanctuaries Act:* The NMSA applies in national marine sanctuaries designated by Congress or the Secretary of Commerce. These sanctuaries must be areas of special national significance in the marine environment, which includes coastal and ocean waters, as well as the Great Lakes and their connecting waters. The seaward limit of the NMSA is the 200 nautical mile exclusive economic zone (EEZ) and continental shelf.

Holding: The National Oceanic and Atmospheric Administration's regulation (15 C.F.R. § 935.7(a)(2)(iii)) prohibiting dredging or otherwise altering the seabed of the Channel Islands National Marine Sanctuary, other than to anchor or bottom trawl, is neither overbroad nor unconstitutionally vague as applied to the excavation activities of the appellants in the sanctuary.

General Facts:

The National Park Service (NPS) became aware that scuba divers were routinely looting underwater cultural heritage from the Channel Islands National Park and adjacent Channel Islands National Marine Sanctuary (CINMS or Sanctuary), off the coast of California in October 1987. Based on an advertisement for a brass-collecting dive cruise, NPS and the National Oceanic and Atmospheric Administration (NOAA) organized a 'sting' operation in which two undercover NPS officers participated in a three-day diving trip disguised as sport divers who had recently moved to California. Clifton Craft, Jack Ferguson, and William Wilson (appellants) also participated in this diving trip. The undercover officers witnessed several divers descending with prying and cutting hand tools that they used to excavate the Sanctuary seabed and remove artifacts from two shipwrecks they visited within the Sanctuary. The rangers also witnessed the dive master, Ferguson, announce to the divers that the shipwrecks were in a federal reserve and were protected. He informed the group that removing objects was illegal and, to aid them, an underwater alarm would alert the group if a NPS enforcement patrol approached. When the dive boat returned to the harbor, several enforcement officers were waiting on the dock, having received word from the undercover officers. The officers seized the divers' hammers, chisels, and other excavation tools, as well as artifacts they took from the wreck sites. The officers questioned and took statements from many of those onboard.

Based on the rangers' testimony and other evidence, NOAA pursued a civil enforcement case under the NMSA, which had the largest fine provision of applicable laws. There are two regulations implemented in every National Marine Sanctuary that provide broad protection of underwater cultural heritage by prohibiting: (1) the removal of, or injury to, historic sanctuary resources, and (2) alteration of the seabed "in any way." (15 C.F.R. §§ 935.6-935.7). Of the 19

individuals charged, 12 settled their cases with NOAA, mostly by paying fines from \$500 to \$10,000. The remaining seven defendants (6 scuba divers and the dive master) requested an administrative hearing appealing both of the regulations applied in the administrative enforcement proceedings against the divers.

Procedural Posture:

A six year legal process ensued, involving four distinct phases: (1) an administrative hearing before an Administrative Law Judge (ALJ) resulting in an initial decision; (2) an appeal of this decision to the NOAA Administrator; (3) a lawsuit in federal district court; and (4) an appeal to the Court of Appeals for the Ninth Circuit.

Following the four-week administrative trial, the ALJ found that the divers and dive master (petitioners) unlawfully removed artifacts from the shipwrecks and unlawfully altered the seabed by excavating with hammers and chisels. The ALJ found that both Craft and Wilson repeatedly hammered at the seabed and that Ferguson admitted that one site looked like a minefield after the divers' activities. The Judge expressly rejected the divers' assertion that their activities were a *de minimus* violation of sanctuary regulations, finding that the alteration to the seabed was sufficiently extensive to locate the sites days after the divers left the site. NOAA adopted the ALJ's findings and recommended decision to order the wreck divers and dive master to pay the penalties assessed; the ALJ even raised the fine after determining it to be too low. The administrative case resulted in NOAA assessing a total of \$132,000 against the petitioners.

The dive master and divers' (defendants) request for a review of the ALJ's decision was filed with the NOAA Administrator in late 1990. The Administrator found the defendants' petition did not satisfy the regulatory requirements for an appeal but reviewed the transcripts and case history. The Administrator did not find any basis for granting an appeal and denied the defendants' petition for review. (6 O.R.W. 684 and 687 (NOAA App. 1992)).

The divers and dive master (plaintiffs) subsequently appealed in the U.S. District Court for the Central District of California. There were no disputed issues of fact in the case. The plaintiffs' claims were reduced to the following: (1) declaratory relief that the NOAA regulation (15 C.F.R. § 935.7(a)(5)) violates the MPRSA (16 U.S.C. § 1434(c)) and that plaintiffs have a pre-existing right to salvage historic shipwrecks under admiralty law; (2) declaratory relief that the regulation prohibiting seabed alteration (15 C.F.R. § 935.7(a)(2)(iii)) is unconstitutionally vague and overbroad as applied to the plaintiffs; and (3) the civil penalties assessed against the plaintiffs by the Department of Commerce ALJ were disproportionate to the harm caused and must be remanded. The matter was briefed and argued by the plaintiffs and defendants and submitted to the Court on the plaintiffs' motion for summary judgment.

The District Court rejected the plaintiffs' arguments, finding that: (1) the regulation prohibiting seabed alteration "in any way" is sufficiently clear; (2) the Secretary acted within his authority under the MPRSA to prohibit the removal of historic artifacts from the Sanctuary, and such prohibition implements the MPRSA's purpose to protect and preserve sanctuary resources, as well as other values of the protected area; (3) plaintiffs' do not have a right under admiralty law to remove artifacts from the Sanctuary - such a right would render the statute meaningless by

allowing pre-existing rights and activities to supersede sanctuary regulations and “even if the defendants have a right . . . , the Secretary acted within its authority to regulate that right . . . [and] anyone holding a pre-existing right [must] apply for a permit to ensure that recovery is done in an environmentally and archaeologically sound manner”; and (4) the civil penalties assessed by the ALJ were not an abuse of discretion and were proportionate to the harm caused to historic resources and the seabed. The District Court entered summary judgment for the government. (*Craft*, [No. 92-1769 \(C.D. Cal. 1992\)](#)).

The divers and dive master (appellants) then appealed the decision to the U.S. Court of Appeals for the Ninth Circuit, only challenging the constitutionality of the regulation prohibiting seabed alteration as applied to their activities in removing underwater cultural heritage. The Ninth Circuit affirmed the decision of the District Court.

Court Holding and Reasoning:

The Ninth Circuit ruled that the regulation of seabed alteration was neither overbroad nor unconstitutionally vague as applied to the appellants’ conduct, affirming the lower court’s decision.

The overbreadth doctrine requires that the enactment reach a substantial amount of constitutionally protected conduct; if it does not, it must fail. The appellants did not claim that the regulation prohibited any constitutional or fundamental right, so the Court found that the overbreadth challenge must fail.

The Court noted that various factors affect its vagueness analysis. The degree of vagueness tolerated by the Constitution is greater for a statute providing for civil sanctions, as here, than for one involving criminal penalties because the consequences of imprecision are less severe. A scienter requirement (intent or knowledge of wrongdoing) may also mitigate vagueness. Most importantly, if a law threatens to inhibit the exercise of constitutionally protected rights, a more stringent vagueness test applies. The Court determined that this regulation does not inhibit the exercise of constitutionally protected conduct. After applying these factors, the Ninth Circuit upheld the regulation.

For a statute to prevail in a vagueness challenge, it must give a person of ordinary intelligence adequate notice of the conduct it proscribes; the regulation’s terms should be sufficiently clear. The Court held that “the regulation by its terms clearly prohibits appellants’ activities.” The language of the regulation, specifically the term “alter” and the phrase “in any way”, is sufficiently broad to provide fair warning to the public that such activities are prohibited. The Court declined to use the principle of statutory construction suggested by the appellants, which would limit the prohibition on altering the seabed to industrial and commercial activity. Appellants argued that only industrial and commercial activity was prohibited and to penalize artifact recovery without notice that such activity was prohibited violates their right to due process. The Circuit Court found that unless the activity falls within the two explicitly listed exceptions to the prohibition on altering the seabed (anchoring and trawling), any alteration is clearly prohibited. The Court concluded, “[T]here can be no doubt that appellants were aware that their activities were prohibited.”

The Court of Appeals held that the NOAA regulation prohibiting dredging or otherwise altering the seabed of the CINMS, other than to anchor or bottom trawl, was not overbroad nor unconstitutionally vague as applied to the excavation activities of the appellants in the Sanctuary.

Notes:

In the district court, the plaintiff unsuccessfully argued that the law of salvage superseded the authority to prohibit or restrict their salvage activities. The Court rejected the argument and held that the NMSA could restrict or prevent their salvage activities. On appeal, the plaintiff-appellants did not challenge or even raise the issue again.

This case recognizes that under the NMSA, NOAA has the jurisdiction and authority to regulate salvage activities. Even those individuals with pre-existing admiralty rights may be required to obtain permits. More importantly, the District Court cited a Florida NPS case (*Klein v. Unidentified, Wrecked and Abandoned Vessel*, 758 F.2d 1511 (11th Cir. 1985)) in finding that the designation of a sanctuary gives NOAA “constructive possession” over historic resources in the sanctuary. Thus, the Judge found that NOAA has the authority to preclude the application of the admiralty law of salvage or finds to historic resources in National Marine Sanctuaries. As a matter of law, historic sanctuary resources are safe from challenges under the admiralty law of salvage and finds.

As a litigation strategy, linking natural and historic resource damages can strengthen the case against an offender, as seen in this case in which the government raised the protection of the seabed in conjunction with penalizing the looters of historic sanctuary resources. Likewise, in a non-sanctuary case, [*Lathrop v. The Unidentified, Wrecked and Abandoned Vessel*](#) (817 F. Supp. 953 (M.D. Fla. 1993)), the United States successfully linked Lathrop’s treasure-hunting activities with potential damage to turtle nesting grounds.

While most major heritage resource statutes provide for criminal enforcement mechanisms, the NMSA uses civil remedies and authorizes civil penalties for violations within sanctuaries. This case provides a standard for assessing civil penalties for natural and cultural resource destruction in sanctuaries since the District Court found that the fines were proportionate to the harm. The ALJ raised the fines from \$32,000 to \$132,000 after finding the penalties were too low; \$50,000 increase for altering the seabed and \$50,000 increase for removing historic resources – the maximum fine allowed by law at that time and the largest civil penalty assessed to date for injury to, or destruction of, historic resources in marine or terrestrial context. In 1992, the NMSA was amended and the maximum civil penalty was raised to \$100,000 for each such violation, with each day of a continuing violation constituting a separate violation. (16 U.S.C. § 1437(d)). Under a more general authority, the ceiling is periodically updated to account for inflation.

Since federal and state criminal laws may also apply to certain activities, the civil penalty enforcement tool provides resource managers and agency counsel with supplemental enforcement authority. In *Craft*, criminal penalties were pursued by the state of California against the offenders at the same time that federal authorities pursued civil penalties under the

NMSA. This dual-track enforcement authority is nearly nonexistent in other state and federal resource management regimes.

Because most of the users of marine sanctuaries depend on their marine craft to carry out their activities, the authority to confiscate vessels, equipment, and cargo pursuant to the NMSA's forfeiture provision is an effective protection tool when used in the appropriate situation. Actual forfeiture of vessels is a rare occurrence in NMSA enforcement actions. Usually, bonds are posted for the vessels in lieu of forfeiture to ensure the recovery of civil penalties under § 307 or damages under § 312. However, in some circumstances, particularly when an operator abandons a vessel, the forfeiture authority is used. In a civil action, *United States v. Fisher* (22 F.3d 262 (11th Cir. 1994)), the federal government invoked the forfeiture provision in two ways: (1) to order forfeiture of vessels implicated in the violation, and (2) to seek the return of the submerged heritage resources that were illegally recovered from the Florida Keys National Marine Sanctuary.

Court Records, Briefs, or Filings:

- Craft, [Agency's Opening Brief for Department of Commerce Administrative Law Judge](#) (1989).
- Craft, [Plaintiffs' Motion for Summary Judgment](#) (C.D. Cal. 1992).
- Craft, [Plaintiffs' Memorandum of Law in Support of Their Motion for Summary Judgment](#) (C.D. Cal. 1992).
- Craft, [Plaintiffs' Appendix to Their Motion for Summary Judgment](#) (C.D. Cal. 1992).
- Craft, [Plaintiffs' Motion for Enlargement of Time](#) (C.D. Cal. 1992).
- Craft, [Federal Defendants' Opposition to Plaintiff's Motion for Summary Judgment](#) (C.D. Cal. 1992).
- Craft, [Defendant's Statement of Genuine Issues as to Plaintiff's Motion for Summary Judgment](#) (C.D. Cal. 1992).
- Craft, [Appellant's Opening Brief](#) (9th Cir. 1993).
- Craft, [Brief for the United States](#) (9th Cir. 1993).

Additional Sources:

- Sherry Hutt, Caroline M. Blanco & Ole Varmer, *Heritage Resources Law: Protecting the Archeological and Cultural Environment* (The National Trust for Historic Preservation) (1999).